CITATION: 176519 Canada Inc. v. 2429306 Ontario Inc., 2024 ONSC 174
COURT FILE NO.: CV-18-75707
DATE: 2024/01/08

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **176519 CANADA INC., GLENN VODDEN and MICHELLE VODDEN**,laintiffs

AND:

2429306 ONTARIO INC., C.A.C.E. CONSTRUCTION (1991) LTD., PAUL LEMIRE AND PAUL MOUSSEAU, Defendants

BEFORE: C. MacLeod RSJ

COUNSEL: J. Alden Christian & Matthew Benson, for the Plaintiffs

David Contant for the Defendants

HEARD: Costs Submissions in Writing

COSTS DECISION

[1] On August 22, 2023, I gave judgment in this matter following a trial (see 2023 ONSC 4789). Subsequently, counsel appeared to make submissions on the calculation of pre-judgment interest. I have now received written submissions on costs.

[2] The plaintiffs were successful insofar as the promissory note in question was found to remain due and owing and I denied the defendants most of the setoff claims. I did however find that the plaintiff owed a significant credit to the defendants for cash in the bank at the time of the closing. I otherwise dismissed the counterclaim. In the result, judgment was given to the plaintiffs in the amount of $164,822.96 which together with pre-judgment interest is now $256,332.07.

[3] The plaintiff had apparently offered to settle for the all inclusive amount of $200,000 in November of 2017 prior to litigation commencing. With the benefit of hindsight, it would have been prudent to accept that offer but it is not technically a Rule 49 offer and, in any event, in light of my finding that there should be credit for the bank balance held by 176, the amount owing in November of 2017 would have approximated $182,000. Annual interest on $164,822.96 at 7% would have run at $11,537.61 per year.

[4] Once litigation was underway, the plaintiffs made a formal offer under the rules on October 4, 2022 in the amount of $225,000 (inclusive of PJI) plus partial indemnity costs. $225,000 is slightly less than the amount that would have been owing on the date of the offer based on my

findings at trial and applying the 7% PJI rate (less the $5,907.93 paid in 2016). The plaintiffs beat their own offer and certainly beat the $150,000 (plus costs) offer made by the defendants in response.

[5] The plaintiffs are seeking costs of $108,142.48 inclusive of fees, disbursements and HST. This is based on 60% of the actual costs incurred up to October 4, 2022 and 80% of actual costs incurred after that date.

[6] Counsel for the defendants acknowledges that the plaintiffs are entitled to costs and apparently beat the Rule 49 offer. He argues however that the costs sought by the plaintiffs would be punitive under all of the circumstances. He submits that the defendant's own costs did not exceed $75,000, that the matter proceeded under Rule 76, and the principles of proportionality, reasonable expectation and fairness should result in a costs award of $40,000 at most.

[7] These are important principles of course. On the other hand, although both counsel should be commended for the efforts they made to streamline the trial, the action was not under Rule 76 when it was commenced in 2018.[1] Moreover, most of the claims advanced by the defendants in an effort to defeat the claim of the plaintiff were found to be devoid of merit. Accusing the plaintiffs of misrepresentation, intimidation and duress were found to be unjustified. This turned a fairly minor dispute about whether the assets of 176 purchased by the defendants should have included the bank account into something much more detailed, intense and personal. This was not entirely one sided. The plaintiffs had also included claims which they abandoned or conceded prior to trial.

[8] Fixing of costs is intended to be a summary process applying all of the factors in Rule 57 and is ultimately a matter of discretion. The court should always be mindful of why there is a costs regime which purposes are reflected in the enumerated factors.[2] The principles of indemnity and promotion of settlement weigh in favour of the plaintiff in the case at bar. The principles of proportionality and reasonableness weigh in favour of the defendants but it is important to recall that this was an agreement of purchase and sale in which the defendants attempted to resile from their obligations to pay the plaintiffs. The plaintiffs had no option but to pursue the matter unless they were prepared to walk away from the balance owing to them and leave the defendants in possession of the construction company and its assets.

[9] I conclude that there is no good reason to deprive the plaintiffs of the benefit of Rule 49. On the other hand, this does not mean that the court should uncritically approve the amounts claimed in costs. I agree that the overriding principle is reasonableness.[3] I also agree that to the extent additional costs were incurred due to delays occasioned by adjournments due to COVID or lack of judicial resources, those costs were borne by both parties and should not be visited on the

[1] In 2018 the SR limit was $100,000 and in any event the current cap on costs for Rule 76 cases in Rule 76.12.1 does not apply – see Rule 76.12.1 (2).
[2] See *1465778 Ontario Inc. v. 1122077 Ontario Ltd.,* (2006) 82 OR (3d) 757 (CA)
[3] *Davies v. Clarington,* [2009] O.J. No. 4236 (CA) (Quicklaw)

defendants. Finally, while it is sometimes unavoidable that costs approach or exceed the amount in dispute, the principle of proportionality does require that in those instances, the court should take the amount ultimately awarded into account.

[10] This was a fairly short trial with relatively simple issues. It is not unusual that a plaintiff's costs are higher than a defendant's because the plaintiff has the onus of prosecuting the action and proving its case. In my view a reasonable award of costs on a partial indemnity scale to the date of the offer to settle (inclusive of HST because that is the way in which the bill of costs was prepared) would be $30,000 and from the offer to settle to the conclusion of trial on a substantial indemnity scale would be $70,000.

[11] In conclusion, I fix the plaintiff's costs at $100,000 inclusive of HST and Disbursements.

[12] Counsel had agreed on the form of the judgment apart from the amount of the costs. I have therefore signed judgment for $256,332.07 plus costs fixed at $100,000.[4] Post judgment interest will run at 7% in accordance with the *Courts of Justice Act*.

Justice C. MacLeod

Date: January 8, 2024

[4] The draft judgment contemplated "costs plus HST" but as noted above the written submissions were for HST inclusive amounts and the formal judgment reflects that.

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BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: J. Alden Christian & Matthew Benson, for the Plaintiffs

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COSTS AWARD

Regional Senior Justice C. MacLeod

Released: January 8, 2024